

New York City Employers Cannot Discriminate Based on Unemployment Status As of June 11, 2013

Michael C. Schmidt • 212.453.3937 • mschmidt@cozen.com

The New York City Council continues to grow the chasm that exists between New York City employment law and its state and federal counterparts. Specifically, on March 13, 2013, the council overwhelmingly enacted (by a 43-4 vote) a local law that precludes employers and employment agencies from refusing to consider or hire an applicant because he or she is unemployed, and from posting advertisements that require job applicants to be employed. This comes less than a month after New York City Mayor Michael Bloomberg initially vetoed the legislation, which now is set to become effective on June 11, 2013.

What's The Law?

The new law amends the New York City Administrative Code (New York City Human Rights Law), which applies to employers with four or more employees. Adding a new protected class to the list of prohibited discrimination bases, Section 8-107[21] now provides that, unless otherwise expressly permitted elsewhere:

- “[A]n employer, employment agency, or agent thereof shall not base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant’s unemployment.”
- “[N]o employer, employment agency, or agent thereof shall publish, in print or in any other medium, an advertisement for any job vacancy in this city that contains one or more of the following: (a) Any provision stating or indicating that being currently employed is a requirement or qualification for the job; (b) Any provision stating or indicating that an employer, employment agency, or agent thereof will not consider individuals for employment based on their unemployment.”

But where this new law taketh, it also giveth, in terms of what is expressly carved out of the new law. Specifically, the new law:

- Does not prohibit consideration of unemployment status “where there is a substantially job-related reason for doing so.”
- Does not prohibit inquiries into the reasons or circumstances “surrounding an applicant’s separation from prior employment.”
- Does not prohibit consideration of (or publication of an advertisement that requires) substantially job-related qualifications, “including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.”
- Does not prohibit giving priority to applicants who are currently employed by the employer.
- Does not prohibit “setting compensation or terms or conditions of employment for a person based on that person’s actual amount of experience.”

What's The Effect?

The purpose of the new law in trying to ignite the re-employment of the unemployed seems a salutary goal, particularly with unemployment in New York City hovering around 9 percent. Yet, the new law poses significant challenges to both sides of the employment aisle. On the one hand, applicants need to prove the existence of discrimination based on “unemployment,” which has been defined to require proof that the applicant does not have a job, and is available for work, and is seeking employment. An applicant must also prove that his or her unemployment status was a motivating factor in the company’s decision not to consider or hire.

On the other hand, the new law will likely be seen by employers as another sign that New York's at-will doctrine is slowly eroding in New York City in favor of increased government scrutiny over hiring and firing decisions, and a far less stringent interpretation of existing anti-discrimination laws than in corresponding state and federal provisions. On all levels, we have seen a burgeoning list of protected classes in recent years, from sexual orientation and military veteran status, to credit history, unemployment status, and even certain social media activity. It is likely this new law is only the next step in employee rights legislation, and it remains to be seen whether it will spur additional litigation.

What Now?

Employers and employment agencies that do business in New York should take certain steps to minimize potential liability in this area:

1. Ensure that personnel involved in the hiring process understand the new law, and what is and is not prohibited as of June 11, 2013.

2. Review and revise existing hiring protocols and practices to ensure compliance with the new law.
3. *Effectively train* hiring personnel and those responsible for job advertisements/postings, as well as the company's managers, who might (without adequate training) be inclined to offer comments or perspectives on preferences and biases involving unemployment status.
4. Accurately and fully document the hiring process, most critically with respect to the reason(s) an applicant might not be considered or hired for a particular position. Such contemporaneous documentation may go a long way in trumping a claim that one's unemployment status motivated an adverse employment action.

For more information about New York employment law, contact the author, or visit his blog at <http://www.socialmediaemploymentlawblog.com/>.